Supreme Court, U.S.
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Nº. 06-1259

In The
Supreme Court Of The United States

OCTOBER TERM 2006

APPEAL FROM THE MONTANA SUPREME COURT

JOSEPH F. NASCIMENTO,
PETITIONER,

V.

MONTANA SUPREME COURT, et al,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORRI
TO THE MONTANA SUPREME COURT

PETITION FOR REHEARING

Counsel:

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PETITION FOR REHEARING

Petitioner/Appellant Joseph F. Nascimento, pursuant to Supreme Court Rule 42 paragraph 2, presents his Petition for Rehearing of the order dated April 30, 2007 denying his Petition for a Writ of Certiorari in the above-entitled cause, and, in support thereof, respectfully shows:

INTRODUCTION

This is an attorney discipline proceeding brought against Petitioner Joseph F. Nascimento before the Montana Commission on Practice (MCOP) and the Montana Supreme Court. Petitioner sought child support and medical insurance coverage for his daughter from his ex-wife. Montana First Judicial District Court Judge Dorothy McCarter presided over the action.

Petitioner became concerned over several developments in the case. Petitioner filed an appeal to the Montana Supreme Court. In one of his submissions he made certain statements concerning Judge McCarter's handling of the case. Based on Petitioner's statements, Judge McCarter filed an ethics complaint against him with the MCOP.

It is not the purpose of this Petition to litigate the truth of Petitioner's statements concerning Judge McCarter. Suffice it to say that there is already evidence in the record supporting the reasonableness of Petitioner's belief in the truth of many of his statements. There is more evidence which can be offered if Petitioner is allowed to do so in a fair proceeding before an impartial tribunal. Petitioner appeals to this Court to afford him that due process.

The American Bar Association (ABA) made a study of the procedures under Montana's 1983 Rules of Lawyer Disciplinary Enforcement (*RLDE 1983*). *ABA, Report on the Montana Lawyer Regulation System* (Nov. 1993) (*ABA Report*). This report concluded that "the current system creates the appearance of unfairness." Almost a decade later, the Montana Supreme Court chose to implement new Rules of Lawyer Disciplinary Enforcement. (*RLDE 2002*). These rules became effective on July 1, 2002 and incorporated many of the recommendations contained in the *ABA Report*. To remedy the "appearance of unfairness" noted, an independent Disciplinary Counsel as well as review panels composed of Commission on Practice members who initially review complaints, but are not involved with the case thereafter, were established. Rules 1, 3 and 5 (*RLDE 2002*).

Petitioner was not afforded these protections. As the informal complaint against Petitioner was filed before July 1, 2002, the *RLDE 1983*, determined by the ABA to appear to be unfair, would apply. All the feared risks of bias and unfairness identified in the *RLDE 1983* by the *ABA Report* became realities in Petitioner's case.

In this motion, Petitioner asks the Court to reconsider the prior denial of a Writ of Certiorari, to thereafter grant the Writ and determine:

1. The extent to which combination of adjudicatory, prosecutorial and investigative functions in lawyer disciplinary tribunals is permissible under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and
2. Whether, under the facts of Petitioner's case, the Due Process Clause of the Fourteenth Amendment was violated.

GROUNDS FOR REHEARING

I. THIS CASE PROVIDES AN OPPORTUNITY FOR RESOLUTION OF UNCERTAINTY AND CONFLICT AMONG THE STATES AS TO WHAT DUE PROCESS RIGHTS ATTACH TO ATTORNEY DISCIPLINE PROCEEDINGS.

This case is a clear opportunity to settle uncertainty and conflict among the highest state courts as to the applicability in attorney discipline proceedings of **Withrow v. Larkin**, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct 1456 (1975) which permitted the combination of adjudicatory, investigative and prosecutorial functions in administrative agencies. **Withrow** held, in part, that, without more, due process is not violated when an administrative board receives the results of an investigation, approves the filing of charges based on the investigation and then subsequently adjudicates those charges.

Cases which have cited **Withrow** as permitting the combination of investigatory functions with adjudicatory functions in attorney disciplinary poceedings include **Goldstein v. Commission on Practice**, 2000 MT 8, 297 Mont. 493, 995 P.2d 923, cert. den. sub nom. **Albers v. Supreme Court**, 531 U.S. 918, 121 S.Ct. 276, 148 L.Ed.2d 201 (2000); **In re Davis**, 682 P.2d 38, 40 (Ariz. 1981) and **People v. Varallo**, 913 P.2d 1, 4-5 (Colo. 1996). To the contrary, it has been held in **Tweedy v. Oklahoma Bar Ass'n**, 624 P.2d 1049, 1053 (Okla. 1981) that due process was violated by the Oklahoma disciplinary procedures because "[c]oncentrating

the powers of judge and prosecutor in the same person or body poses an unreasonably high risk of compromising the protected and cherished value of judicial detachment and neutrality." See also, **In re Schlesinger**, 172 A.2d 835 (Pa. 1961) citing **In re Murchison**, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) in holding that the combinations of the functions of prosecutor, judge and jury in an attorney disciplinary proceeding violated due process.

Petitioner maintains that this portion of **Withrow** is inapplicable to attorney discipline tribunals. Administrative agencies such as those in **Withrow** are not part of the judicial branch of government. In **Razatos v. Colorado Supreme Court**, 756 F.2d 1429, 1435 (10th Cir. 1984) it was held that attorney disciplinary proceedings were "definitely judicial rather than administrative in nature." MCOP has, been classified as "an arm of" the Montana Supreme Court. **Goldstein**, supra, 2000 MT 8 at ¶76 (J. Nelson dissenting). As such, the protections of due process inherent in courts, as opposed to those in agencies, should apply.

As attorney disciplinary tribunals are deemed a part of the judicial system, courts tend to accord their recommendations the weight of judicial determinations, although many of the due process rights are not available. This is so even after the reviewing court has retained the right of review. In **Goldstein**, supra, 2000 MT 8 at ¶¶ 112 – 120, Justice Nelson discussed the impact of *de novo* review together with the history of disciplinary actions in Montana and stated, at ¶113, that: "The protections afforded by this review are illusory, however, and exacerbate, rather than alleviate the prejudice inherent in Montana's disciplinary system." Justice Trieweiler admitted that he lacked the time to review the record in every MCOP proceeding, did not have the ability to evaluate the credibility of conflicting witnesses and that review "should be of no meaningful comfort to those attorneys who suspect the disciplinary process because of its current structure." **Goldstein**, supra, 2000 MT 8 at ¶128.

Petitioner raised many issues before the MCOP, but none of those issues were considered. The Montana Supreme Court, sitting in review, followed suit and also failed to address these issues. This is evident from the Order of the Montana Supreme Court which is included in the Appendix to this Motion. An interesting comment on page 1 of that Order is the Montana Supreme Court's reference to a Brief filed by "[t]he Commission on Practice" This Brief was

actually filed by the special counsel Kalekczyk. By this reference the Montana Supreme Court apparently conceded that MCOP and the prosecuting special counsel are all part of the same entity.

The conflict over this issue is deep, mature and in need of resolution by this Court.

II. THE PROCEDURES OF THE COMMISSION ON PRACTICE EXPOSED PETITIONER TO A SUBSTANTIAL RISK OF VIOLATION OF DUE PROCESS AND HIS DUE PROCESS RIGHTS WERE VIOLATED TO SUCH AN EXTREME THAT A WRIT OF CERTIORARI SHOULD BE GRANTED.

Even if combining the adjudicatory, investigative and prosecutorial functions in an attorney disciplinary tribunal is not deemed to be a per se violation of due process, special facts and circumstances may render the combination of such roles in an agency impermissible under the Due Process Clause. **Withrow v. Larkin**, 421 U.S. 35, 51 – 58, 95 S.Ct. at 1466-70, 43 L.Ed.2d at 726-29 (1975). Further, in **Withrow** this Court stated that one class of cases "which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable" are those cases where "the adjudicator has a pecuniary interest in the outcome ...." 421 U.S. 35 at 47. (Citing **Gibson v. Berryhill**, 411 U.S. 564 (1973); **Ward v. Village of Monroeville**, 409 U.S. 57 (1972); **Tumey v. Ohio**, 273 U.S. 510 (1927); **Commonwealth Coatings Corp. v. Continental Casualty Co.**, 393 U.S. 145 (1968)).

The procedures under *RLDE 1983* were determined to "create the appearance of unfairness" in the *ABA Report*. As shown below, facts and circumstances of this case can only lead to the conclusions that the procedures employed created a high risk of unfairness, which risk were realized, and that Petitioner was denied his due process right to an impartial tribunal and fair trial.

A. ALTHOUGH UNDER THE *RLDE 1983*, THE MCOP WAS COMPOSED OF A MAXIMUM OF ELEVEN MEMBERS, TWELVE COMMISSION MEMBERS PARTICIPATED IN MAKING THE DECISION ON THE MERITS.

Rule 1 of the *RLDE 1983* provided in relevant part that: "The Court shall appoint an eleven member commission . . . which shall consist of eight practicing lawyers . . . and three nonlawyers."

Rule 2 of the *RLDE 2002* provides in relevant part: "The Court shall appoint a fourteen – member commission . . . which shall consist of nine practicing lawyers . . . and five non-lawyers." Although the *RLDE 1983* was supposed to apply to Petitioner's case, twelve members of the *RLDE 2002* commission actually participated in the hearing and decision. The newer panel formula was weighted more favorably toward non-lawyers. This failure to adhere to the relevant rules regarding panel composition meant that the MCOP was without jurisdiction. Its actions were void, a nullity from their inception, and constituted a violation of due process.

B. DUE PROCESS WAS VIOLATED BECAUSE SOME COMMISSION MEMBERS WHO FOUND THAT PETITIONER HAD VIOLATED HIS ETHICAL RESPONSIBILITIES ALSO PARTICIPATED IN MAKING THE PROBABLE CAUSE DECISION WHICH LED TO FILING OF THE FORMAL COMPLAINT.

At some undetermined time in early 2002 some of the Commission members were required to have met and made what was, in essence, a probable cause determination pursuant to Rule 9A *RLDE 1983.* Under Rule 1C *RLDE 1983* a quorum was six members. The date and number of members who participated is unknown because Petitioner was denied discovery. Assuming a quorum met, at least four of the twelve members of the MCOP who made the decisions at the May 15, 2002 hearing on the merits also participated in the probable cause determination.

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1969) held that due process requires any person or persons who were involved in making a preliminary decision directed at the rights of any person refrain from later participating in the final decision concerning those rights which is under review by a court.

It can be argued the MCOP's decisions are not final because its determinations are subject to *de novo* review by the Montana Supreme Court. This is not accurate. Under Rule 9B *RLDE 1983* the MCOP is permitted to give "a private admonition to the respondent in the name of the Supreme Court ...." Such private admonitions "are not appealable". The argument also loses its force in light of the revelations by Justices Nelson and Trieweiler concerning *de novo* review in **Goldstein v. Commission on Practice**, 2000 MT 8, 297 Mont. 493, 995 P.2d 923, cert. denied sub nom. **Albers v. Supreme**

Court, 531 U.S. 918, 121 S. Ct. 276, 148 L.Ed.2d 201 (2000) which have been previously discussed. With very few exceptions the Montana Supreme Court adopts the findings, conclusions and recommendations of the MCOP. For all practical purposes the MCOP's determinations are the "final decisions". The fact that neither the Supreme Court, nor the five judge district court panel appointed to reconsider the Supreme Court's Order addressed any of Petitioner's objections further supports the conclusion that review of the MCOP's determinations was, at best, perfunctory.

For this reason, due process was violated and the proceedings below should be nullified.

C. THE PROCEEDINGS BEFORE THE COMMISSION WERE VIOLATIVE OF DUE PROCESS AS SOME COMMISSION MEMBERS AS WELL AS THE SPECIAL COUNSELS WHO PROSECUTED PETITIONER HAD PECUNIARY AND OTHER IMPROPER INTERESTS IN THE OUTCOME .

Petitioner found himself in his predicament because of statements he made indicating serious unethical and criminal activities by Judge Dorothy McCarter one of three judges in the Montana First Judicial District located in the Montana capitol. The initial complaint to the MCOP was made by Judge McCarter. It was evident from the start that the case would turn on the credibility assessments of Petitioner and Judge McCarter. Judge McCarter, as well as Petitioner, had much to gain or lose in the outcome.

Additionally, at least two members of the MCOP who participated in the proceeding, Vice Chairman Gary Davis and MCOP member Michael Lamb, are both Helena attorneys who personally, along with members of their firms, have practiced law for many years and continue to practice law before Judge McCarter. The initial special counsel appointed by the MCOP to investigate and prosecute Petitioner, David Dalthorp, as well as his successor, Stanley Kaleczyk, were members of prominent Helena firms who personally, along with members of their firms, also practice frequently before Judge McCarter.

Further evidence of the close relationship between Judge McCarter and Vice Chairman Davis is the fact that Judge McCarter's husband, Mike McCarter, a Helena attorney for many years and the former Worker's Compensation Judge for the State of Montana, within the last year and a half, took a position with Luxan &

Muffitt, a law firm in which Gary Davis is a principal owner. Also, the daughter of special counsel Stanley Kaleczyk, Jennifer Collins Kaleczyk, who became licensed to practice law in 2002, recently took a position with Luxan & Murfitt.

With this background, and considering psychological tendencies and human weaknesses, MCOP members Davis and Lamb and special counsels Dalthorp and Kalecczyk obviously would benefit from currying favor from, and not displeasing, Judge McCarter. All these individuals had the duty to disqualify themselves from participation in these proceedings.

As to the MCOP members, even without a showing of actual bias, a decisionmaker should be deemed disqualified "where 'experience teaches that the probability of actual bias on the part of . . . the decisionmaker is too high to be constitutionally tolerable.'" **Withrow v. Larkin**, 421 U.S. 35,46, 43 L.Ed.2d 712, 723, 95 S.Ct 1456, 1464 (1975). As previously discussed, the **Withrow** decision states that where the adjudicator has a pecuniary interest in the outcome there has consistently been determined to be a violation of due process. 421 U.S. 35 at 47. However, actual bias was in fact exhibited by these adjudicators. Neither of these MCOP members should have allowed either Dalthorp or Kaleczyk to be appointed as special prosecutors. Davis should not have received ex parte communications from Kaleczyk seeking assistance in drafting the complaint against Petitioner (Exhibit 3 in the Appendix to the Petition for Writ of Certiorari) without informing Petitioner of such communication. Both Davis and Lamb should not have participated in the vote to find Petitioner guilty of ethical violations immediately after the May 16, 2003 hearing, despite Petitioner being assured that he would have thirty days to file proposed findings and conclusions before the case was submitted to the MCOP for determination. The administration of justice requires a fair and impartial tribunal and, when the process is tainted by conduct such as currying favor with a judge before whom the lawyer is likely to appear or has a pending case, the fairness and impartiality of the tribunal is compromised and due process in the administration of justice is prejudiced. See, **In re Powell**, 126 Ill.2d 15, 533 N.E.2d 831 (1988).

As to the investigators and special counsels, Dalthorp and Kaleczyk, in **Young v. United States**, 481 U.S. 787 (1987) it was held that private attorneys appointed to prosecute criminal contempt proceedings must be disinterested the same as public prosecutors.

This requirement of disinterest is so important that "The harmless error doctrine cannot apply since such an error is so fundamental and pervasive that it requires reversal without regard to the facts and circumstances of the particular case." 481 U.S. 787, 809 – 810. Petitioner requests this Court to extend this ruling to private attorneys appointed as prosecutors or special counsel in attorney disciplinary proceedings. Both Dalthorp and Kaleczyk had at least the appearance of a conflict involving potential pecuniary gain, given the fact that they personally, as well as members of their firms, practiced extensively before Judge McCarter. Kalekczyk's daughter, as well as Judge McCarter's husband, became associated with Gary Davis' law firm. There was no proper reason why Dalthorp and Kaleczyk, rather than counsel outside the First Judicial District who did not regularly practice before Judge McCarter, were appointed as investigators and special counsels. Their appointment can be explained by a desire of members on the MCOP to guarantee biased prosecutors with a close allegiance to the interests of Judge McCarter. Actual harm in the form of prejudicial treatment by Dalthorp and Kaleczyk is present. Dalthorp testified at the hearing that he had destroyed his investigative notes which Petitioner had sought through discovery and was denied. The opportunity to obtain any exculpatory material which may have been contained in Dalthorp's notes was denied to Petitoner by Dalthorp's actions. As to his successor, Kaleczyk, his prejudicial actions included, but were not limited to, sending ex parte communications to MCOP Vice Chairman Davis as well as the secretary to the MCOP seeking their input as to the formal Complaint against Petitioner (Exhibits 3 and 4 in the Appendix to the Petition for Writ of Certiorari which Petitioner obtained by happenstance), opposing all forms of discovery requested by Petitioner and either being present when or being otherwise aware that the MCOP unlawfully voted to find Petitioner guilty of ethics violations prior to submission of the matter through filing of proposed findings of fact and conclusions of law. This latter fact is corroborated by the fact that Kaleczyk did not submit proposed findings and conclusions, although MCOP Chairman Warren had ordered simultaneous filings within thirty days. As an attorney, Kaleczyk had an ethical obligation to call this flagrant error to the attention of the MCOP.

The appearance of bias, pecuniary and other improper interest and conduct of MCOP Vice Chairman Davis and member Lamb precludes the MCOP from being considered an impartial

tribunal. The appearance of improper interest in the outcome and prejudicial conduct by the investigators and special counsels Dalthorp and Kaleczyk rendered them improper persons to serve in those capacities. Fundamental due process was denied to Petitioner.

D. THE DUE PROCESS RIGHT TO AN IMPARTIAL TRIBUNAL WAS VIOLATED WHEN, IMMEDIATELY AFTER PETITIONER WAS INFORMED HE HAD THIRTY DAYS TO SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND HE HAD LEFT THE BUILDING, THE COMMISSION VOTED TO FIND PETITIONER GUILTY OF PROFESSIONAL MISCONDUCT.

"'Ay,' replied the Preceptor, 'trial moves rapidly on when the judge has determined the sentence beforehand.'" Sir Walter Scott, Ivanhoe, Chapter 36.

At both the beginning and end of the hearing on the merits on May 15, 2003, MCOP Chairman John Warren, with all participating MCOP panel members present, advised Petitioner of his right to present proposed findings and conclusions within thirty days of the hearing, and that sometime after that time the MCOP would reach its decision. Petitioner agreed to submit his proposed findings and conclusions within thirty days of the hearing. Chairman Warren ordered "simultaneous findings in 30 days." However, after the MCOP members were assured that Petitioner had left the building, the MCOP members immediately voted to find Petitioner guilty of the ethics violations charged in the Complaint. Special Counsel Kaleczyk was either present when the MCOP took this vote or learned of the vote after the hearing. Although Petitioner filed his proposed findings and conclusions within thirty days, Kaleczyk did not file any proposed findings of fact and conclusions of law. It was only during a transcribed telephone hearing concerning the assessment of costs held after the Montana Supreme Court conducted its pro forma review of the MCOP's determination and had entered its Order suspending Petitioner from the practice of law for an indefinite period of at least two years that Petitioner discovered these facts. Chairman Warren admitted during that hearing, with all but one panel member present, that: "[T]he Commission deliberated after the hearing. There was no other hearing." Although this fact was brought to the attention of the five district judges who were appointed to hear Petitioner's request for reconsideration, this panel

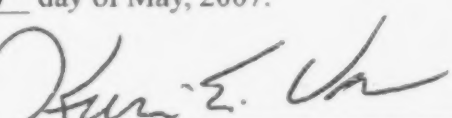
in its May 9, 2006 order, did not even address this issue. The review by this panel of judges was pro forma at best, and judicial review at its worst.

In the context of lawyer discipline proceedings the Fourteenth Amendment Due Process Clause requires fair notice of the charges sufficient to inform and provide a meaningful opportunity for explanation and defense. **In re Ruffalo**, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222, *reh. denied* 391 U.S. 961 (1968). In criminal proceedings this Court has held that even in non-jury trials: "'The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right.' " **Herring v. New York**, 422 U.S. 853, 860 (1975). (Quoting with approval **Yopps v. State**, 228 Md. 204, 207, 178 A.2d 879, 881 (1962)). Petitioner asks the Court to hold that due process also encompasses the right of a self-represented attorney in a disciplinary proceeding to present his final arguments of the facts and law in written form prior to a determination as part of the due process meaningful opportunity for explanation and defense. This should especially be true where such attorney was told by the adjudicator that he would have such a right.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue.

DATED this 25th day of May, 2007.



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CERTIFICATE OF COUNSEL

I, Kevin E. Vainio, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 44, subdivision 2, of the Rules of this Court.

DATED this 25th day of May, 2007.

Kevin E. Vainio, Attorney for Petitioner/ Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2007 I served the foregoing upon opposing counsel by depositing (3) three true and correct copies thereof in the United States mail, postage prepaid, addressed as follows:

Christian D. Tweeten
Montana Attorney General's Office
P.O. Box 201401
Helena, Montana 59620-1401

Kevin E. Vainio, Attorney for Petitioner/Appellant

APPENDIX

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 02-778

IN THE MATTER OF
JOSEPH NASCIMENTO,

An Attorney at Law,

Respondent.

The Commission on Practice of the Supreme Court of the State of Montana filed its Findings of Fact, Conclusions of Law, and Recommendations of the Commission in this matter on September 23, 2003. After some delay by virtue of a request for transcript and the filing of a motion to dismiss, this Court directed Nascimento to file his objections to the Findings and Conclusions of the Commission on or before Friday, December 12, 2003. (Order dated October 28, 2003). On December 15, 2003, Nascimento filed his "Findings of Fact and Conclusions of Law and Recommendation of the Montana Supreme Court." In his filing, consisting of thirty-six pages of narrative together with twenty exhibits, Nascimento denies having violated the Montana Rules of Professional Conduct. Moreover, he continues to allege that the Honorable Dorothy McCarter, Lewis and Clark County District Court, has destroyed evidence and court documents, and that she has "fixed" an ethics complaint against his ex-wife's attorney and received "kick-backs" from Nascimento's ex-wife in exchange for ruling in her favor in the divorce action. He further charges that Judge McCarter and others whom he believes have conspired with her, should be criminally prosecuted. The other allegations in Nascimento's Findings and Conclusions are too numerous to mention and are not relevant to the proceedings before this Court.

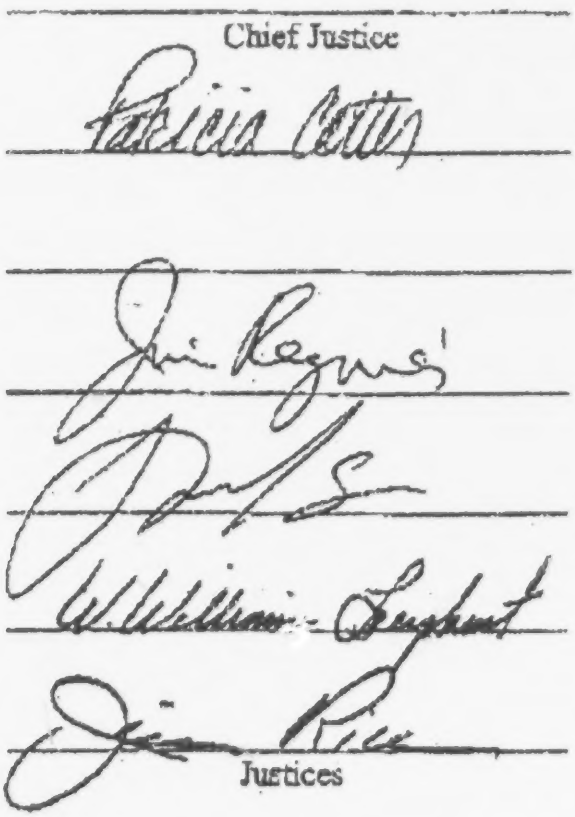
The Commission on Practice has filed a brief in reply to Nascimento's Findings of Fact and Conclusion of Law, and has also filed a Motion to Strike Exhibits.

The Secretary of the Commission on Practice. The Clerk is further ordered to mail copies of this Order to the District Courts of the State of Montana, to the Clerk of the Federal District Court of the District of Montana, to the Clerk of the Circuit Court of Appeals of the Ninth Circuit, and to the Executive Director of the State Bar

of Montana.

DATED this 20th day of January, 2004.

Signatures



CHEIF JUSTICE KARLA M GRAY AND JUSTICE JOHN WARNER DID NOT PARTICIPATE IN THIS MATTER.